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No. 85-1498

In The
Supreme Court of the United States
October Term, 1985

MARTHA U. MOORE and CHARLES MOORE,
Petitioners,

vs.

VOLKSWAGENWERK, A.G., VOLKSWAGEN OF AMERICA, INC. and SOUTHERN VOLKSWAGEN, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS VOLKSWAGENWERK, A.G. AND VOLKSWAGEN OF AMERICA, INC. TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the trial court acted fairly and reasonably under Rules 50 and 59 of the Federal Rules of Civil Procedure in granting a new trial as to all of the defendants when only the manufacturer and distributor had requested such relief.

RULE 28.1 STATEMENT

A disclosure of corporate affiliations and financial interests of these respondents was filed with the Fourth Circuit on August 16, 1984 in case No. 84-1890.

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OPINION BELOW

The district court rendered an opinion on an evidentiary issue in the instant case which was published as *Moore v. Volkswagenwerk, A.G.*, 575 F.Supp. 919 (D. Md. 1983). That opinion is not at issue.

STATEMENT OF THE CASE

Petitioners' presentation of the statement of the case mandates clarification of certain facts. First, the only cause of action against all defendants presented to the jury was strict liability in tort for manufacture as defined by Restatement (Second) of Torts § 402A (1965). The jury's verdict was in the amount of $50,000.00 against Southern Volkswagen, Inc. ("Southern"), the automobile dealer, and $100,000.00 each against Volkswagen of America, Inc. ("VWOA"), the automobile distributor, and Volkswagenwerk, A.G. ("VWAG"), the manufacturer. This disposition was confirmed by the jury upon direct questioning by the court. (Respondents herein briefed and argued the impropriety of this verdict in the Fourth Circuit).

The district court's decision to grant a new trial as to all respondents was partially based on the court's inability to proceed on the contribution and indemnification aspect of this strict liability for manufacture case. The court twice stated that it was "perilously close" to granting a judgment n.o.v. in favor of all defendants. It granted a new trial rather than judgment n.o.v., not because it lacked confidence in such a decision, but to give petitioners a chance to remedy the apparent insufficiencies in their case.

Following the court's order of July 12, 1984, the petitioners simultaneously filed a petition for writ of mandamus and noted the appeal in the Fourth Circuit which is the subject of the instant petition. The petition for writ of mandamus was dismissed by the court of appeals on motion made by the respondents.

A second trial was held on October 29, 1984. Petitioners after the case was called rested without presenting evidence. Judgment was entered in favor of all respondents. Petitioners then noted a second appeal, this time on the merits of the new trial order. The Fourth Circuit affirmed the district court in all respects in an unpublished opinion.

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REASONS FOR DENYING WRIT

The unpublished opinion of the Fourth Circuit decided issues that are far more complex and rare than is indicated by petitioners.

The cause of action common to all of the respondents submitted to the jury was strict liability in tort for manufacture. Petitioners' evidence as to strict liability in tort was the same for Southern as it was for the other two respondents, and all three respondents presented the same defense. The jury was instructed that Southern's potential liability was derivative of the manufacturer's.

The district court granted the new trial as a result of deficiencies in petitioners' case that went to the liability of all of the respondents. There was no reason for the district court (or petitioners) to differentiate between the manufacturer and distributor on the one hand, and the dealer on the other. To do so would have created

an illogical and unreasonable situation: a judgment in favor of the manufacturer and distributor based on strict liability in tort for alleged manufacturing defects co-existent with a judgment against the dealer on the same cause of action and on the identical evidence presented. Both the district court and court of appeals labeled this situation as inconsistent verdicts. The district court allowed petitioners a fresh opportunity to present credible evidence to support their claim of strict liability for manufacture against all of the respondents. Petitioners rejected this opportunity and instead created a technical and artificial situation to test a purely procedural point. Petitioners do not now contest the district court's exercise of discretion in finding that the verdict against all of the respondents was not supported by the weight of the evidence, or the Fourth Circuit's affirmance of that decision. This remains undisturbed. To reinstate the verdict against Southern on the technical point that petitioners advance, would, therefore, create a judgment out of thin air: one based on evidence that two courts have found to be lacking.

The inconsistency of differing verdicts is self evident. Petitioners argue that since respondents are jointly and severally liable, a verdict against one obviates the inconsistency since there can be no double recovery. However, this argument ignores the reality in this case. This is neither a situation where a judgment has been rendered solely against the retailer for strict liability, nor is it one wherein a judgment has been entered against the retailer and the dealer. In those cases the retailer might have an available action for indemnification against the manufacturer. The application of the concept of joint and several liability in those instances would be logical and fair. That

is not true where, as here, reinstatement of the verdict against Southern would result in two fundamentally contradictory verdicts.

The meaning of the verdict of the first trial is ambiguous. The verdict was in the amount of $50,000.00 against Southern and $100,000.00 each against VWAG and VWOA for a judgment totalling $250,000.00. Respondents argued that the verdict was fatally defective because it was an impermissible apportionment of damages against joint tortfeasors, citing *Lanasa v. Beggs*, 159 Md. 311, 151 A. 21 (1931) as well as cases from neighboring sister states.

Petitioners argue that the verdict was not defective. They also argue that respondents are jointly and severally liable and, indeed, the trial court so instructed the jury. However, the verdict cannot be enforced against Southern on the basis of joint and several liability because it was apportioned by the jury. Neither the district court nor the court of appeals addressed this issue. The clear correctness of the order granting a new trial on the grounds cited in their opinions made a determination of this issue unnecessary. A reversal would plunge this case into a quagmire of inconsistent verdicts.

Petitioners assert that the Fourth Circuit's decision conflicts with decisions from other circuits. This is not so. There are three circumstances that together form the foundation for the holdings in this action. First, the case involved multiple tort defendants whose potential liability was closely related, if not identical. Second, two of the defendants moved for judgment n.o.v. and, alternatively, a new trial; one moved for judgment n.o.v. only.

Third, granting a new trial as to less than all of the defendants would cause inconsistent verdicts. Some if not all of these crucial circumstances are missing in each case relied upon by petitioners. *Peterman v. Chicago, Rock Island and Pacific Railroad Co.*, 493 F.2d 88 (8th Cir. 1974), *cert. den.*, 417 U.S. 947, 94 S.Ct. 3072, 41 L.Ed.2d 667 (1975) and *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411 (8th Cir. 1985) each involved a single defendant who moved for judgment n.o.v. only. There was no notice that a new trial might be granted, and there was no potential for inconsistent verdicts. Reason and justice were not disturbed by refusing to allow a new trial.

Tarlton v. Exxon, 688 F.2d 973 (5th Cir. 1982), *cert. den. sub. nom., Diamond M. Drilling Corp. v. Tarlton*, 63 U.S. 1206, 103 S.Ct. 3536, 77 L.Ed.2d 1387 (1983) and *Kain v. Winslow Manufacturing, Inc.*, 736 F.2d 606 (10th Cir. 1984) are the cases most factually similar. In neither was there a danger of contradictory verdicts. In *Tarlton*, despite the existence of a contractual indemnity between Exxon (the defendant that moved for judgment n.o.v. and new trial) and Diamond M (the party that made no post trial motions), each defendant acted independently. In fact, the court of appeals made the specific finding in reviewing the judgment n.o.v. in favor of Exxon that it was free of negligence and that an employee of Diamond M caused the accident. It is certainly not unfair to refuse a new trial to the sole culpable party. In *Kain* the motions for judgment n.o.v. of both defendants were denied. The court granted the motion for new trial of one and denied that of the other. Thus, at time of appeal there was a judgment against one defendant, from which there was no appeal, and a new trial for the other. A refusal to

grant a new trial to the remaining defendant could not lead to conflicting verdicts because the liability of each defendant was independent. The entry of a judgment either for or against the second defendant would not contradict the earlier judgment against the first defendant.

The Federal Rules of Civil Procedure, particularly Rules 50 and 59, provide a sound basis for the rulings below. Two of the three respondents moved for a new trial. This provided notice to petitioners that a new trial might be granted. Since there was no difference in the evidence presented against the respondents, the fact that more than two of the respondents might be granted a new trial did not create an unfair surprise or hardship at the hearing on the motions. This is precisely the case anticipated by Professor Wright (cited by petitioners):

> The ten day limit [found in Rule 59] applies only if there is no timely motion for new trial and the court is acting entirely on its own initiative. Wright & Miller, *Federal Practice and Procedure* § 2813 p.59 (1973).

Petitioners say that the court of appeals declined to address this issue. Yet, petitioners note the case of *Continental Casualty Co. v. United States*, 167 F.2d 107 (9th Cir. 1948), *cert. den.*, 69 S.Ct. 1517 (1948) which supported Professor Wright's view. The court of appeals cited *Continental* in its opinion to support its holding that the ten day rule is inapplicable in a multiple party case where joint liability may lie, and only one party has moved for a new trial. It is implicit that the Fourth Circuit, thereby, settled any Rule 59 issue.

The opinions of the court of appeals and the district court, contrary to petitioners' assertion, were a proper

blend of the application of the letter of the rules and the spirit of fairness. The evidence before the trial court was such that Chief Justice Burger's admonition in his dissent in *Jackson v. Wilson Trucking Corp.*, 243 F.2d 212, 221 (D.C. Cir. 1957) is vividly appropriate:

> If, upon consideration of the motion, briefs and oral argument, the trial court then concludes the evidence is legally sufficient, although contrary to the verdict, it is powerless, under the rule now announced to grant a new trial, even though it is convinced that is the logical and practical relief. I cannot believe that such rigidities were contemplated by the Federal Rules, lauded as a model of "simplicity and flexibility," and a departure from rigid formalism. The majority view presupposes the line between the *legal* insufficiency which would warrant judgment n.o.v. and the insufficiency which would call for only a new trial is clear and sharp. But this is not so. We do not always have black or white but often grays. In many cases there is a blurred area where even the trial judge with all the evidence fresh in mind and convinced the verdict is wrong is unsure as to which relief should be granted because the standard is essentially one of degree. There is no precise and clearly acknowledged boundary marking the lines which all reasonable judges could apply with the same result. It is in this cloudy or doubtful area where the discretion of the trial judge should be allowed widest latitude and he should not be forced to make the kind of appraisal required by the arbitrary limitations imposed by the majority. . . . (Emphasis in original) (footnote omitted).

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CONCLUSION

For the above stated reasons respondents Volkswagenwerk, A.G. and Volkswagen of America, Inc. respectfully request this Honorable Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-79-202

MARTHA U. MOORE and CHARLES J. MOORE, her husband,

vs.

VOLKSWAGENWERK, A.G., a corporation of the Federal Republic of Germany and VOLKSWAGEN OF AMERICA, INC. a New Jersey corporation and SOUTHERN VOLKSWAGEN, INC., a Maryland corporation

JUDGMENT

This action came on for trial before the Court and a Jury, Honorable Norman P. Ramsey, United States District Judge, presiding. The issues having been duly tried and the jury having duly rendered its verdict, it is Ordered and Adjudged that judgment is entered in favor of Plaintiffs against defendant, Volkswagenwerk, A.G., in the sum of One Hundred Thousand Dollars ($100,000.-00) and in favor of Plaintiffs against defendant, Volkswagen Of America, in the sum of One Hundred Thousand Dollars ($100,000.00) and in favor of Plaintiffs against defendant, Southern Volkswagen, Inc., in the sum of Fifty Thousand Dollars ($50,000.00) for a total judgment in favor of Plaintiffs against Defendants in the sum of Two Hundred Fifty Thousand Dollars and no Cents ($250,-000.00). Dated at Baltimore, Maryland this 23rd day of May, 1984.

Paul R. Schlitz, Clerk

By: /s/ Paul Hanson

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1890

Martha U. Moore; Charles J. Moore,

Appellants,

v.

Volkswagenwerk, A.G., a corporation of the Federal Republic of Germany; Volkswagen of America, Inc., a New Jersey corporation; Southern Volkswagen, Inc., a Maryland corporation,

Appellees.

ORDER

(Filed January 7, 1985)

This appeal comes before us on a second motion to dismiss filed by Southern Volkswagen, Inc. A brief procedural history is necessary.

On May 23, 1984, appellants Martha and Charles Moore obtained a jury verdict against Volkswagenwerk, A.G., Volkswagen of America, Inc., and Southern Volkswagen, Inc. Volkswagenwerk, A.G. and Volkswagen of America timely moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. Southern Volkswagen timely moved only for judgment notwithstanding the verdict. The district court ordered a new trial as to all defendants.

The Moores appealed from that portion of the order granting a new trial as to Southern Volkswagen, assert-

ing their right to immediately appeal from an order granting a new trial where the challenge is to the jurisdiction of the district court to enter the order. *Phillips v. Negley*, 117 U.S. 665 (1886). Because Southern Volkswagen had not moved for a new trial and because the district court did not act within ten days after entry of judgment, the Moores maintain on this appeal that the district court was without jurisdiction to award a new trial as to Southern Volkswagen. *See* Fed. R. Civ. P. 59(d).

The district court clearly had jurisdiction to award a new trial as to Volkswagenwerk, A.G. and Volkswagen of America. The Moores moved, however, to stay retrial pending disposition of the appeal relating to Southern Volkswagen. We denied that motion on October 26, 1984, prior to the date set for a new trial. The Moores declined nevertheless to proceed with retrial, and the district court dismissed the action for failure to prosecute.

Viewing these events, we cannot but conclude that the Moores never intended to go forward with a new trial against Volkswagenwerk, A.G. and Volkswagen of America. As such, their motion for a stay pending appeal was an apparent attempt to hold in parties against whom they had no intention of proceeding. Such a use of the stay provisions is improper and abusive.

Despite our disapproval of the course taken by the Moores, we do not find that these developments entitle Southern Volkswagen to dismissal of this appeal. Accordingly, upon consideration of Southern Volkswagen's second motion to dismiss.

It is ORDERED that the motion is DENIED.

Entered by Judge Murnaghan with the concurrence of Judge Hall and Judge Sprouse.

/s/ Francis D. Murnaghan, Jr.
United States Circuit Judge

DATED: January 7, 1985